No. 15-290

In The

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO., INC. ET AL.

Respondents.

On Petition For A Writ of Certiorari To
The United States Court Of Appeals
For the Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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October 6, 2015

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER, UNITED STATES ARMY CORPS OF ENGINEERS

Amicus curiae National Association of Home Builders ("NAHB") respectfully moves for leave of the Court to file the accompanying brief under Supreme Court Rules 21, 33.1, 37.2. Counsel for both parties received timely notice of *amicus curiae's* intent to file the brief. The Solicitor General has consented to the filing of this brief and written consent has been filed with the Clerk of the Court; counsel for Hawkes Co. takes no position.

NAHB has been involved with litigation concerning whether Clean Water Act jurisdictional determinations are reviewable under the Administrative Procedures Act. In addition, as a representative of land developers, NAHB brings considerate expertise to the issue before the Court.

A large part of building homes consists of obtaining and preparing the land for construction.[1] That land often contains "waters of the United States," as the federal government has defined and interpreted that term. *See* 33 C.F.R. § 328.3(a); 40 C.F.R. § 122.2. Often land developers must alter those "waters" to ensure that their community makes the best use of

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1 NAHB estimates that the cost of the "finished" lot averages 19 percent of the sales price of a home. Heather Taylor, *Cost of Constructing A Homes*, Special Studies (Jan. 2, 2014), http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=221388&channelID=311 (last visited Sept. 30, 2015)

the land in accordance with local and state zoning and land use requirements.

Unfortunately, property owners cannot simply look at their property to determine where "waters of the United States" are present. They must hire consultants — engineers, scientists, and regulatory and compliance specialists, who assist the developers with the permitting process. Those specialists will often develop a "jurisdictional determination" and submit it to the Corps of Engineers for approval. It is common for the developer's consultants and the Corps to disagree on the Corps' jurisdiction. The amount of jurisdiction the Corps asserts over a project will affect whether and how the development proceeds, and sometimes results in a community not being built.

In its Petition for Review, the government cited an Endangered Species Act case, *National Ass'n of Home Builders v. Norton*, 415 F.3d 8 (D.C. Cir. 2005), to support its belief that approved jurisdictional determinations are not reviewable under the Administrative Procedure Act. In the attached brief, *amicus curiae* provides the Court with an analysis of a different NAHB case that is more analogous to this matter: *National Ass'n of Home Builders v. United States Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005).

In addition, NAHB provides an example of situation where the government conducted a jurisdictional determination on its own accord for the purpose of later asserting jurisdiction over thousands of square miles of land. Incredibly, even in that situation, the

government argued that the determination was not a "final agency action" under the APA.

Given the nationwide importance of the issue presented to our members, NAHB agrees with the government that the issue presented in this case is worthy of this Court's review. However, NAHB believes that approved jurisdictional determinations should be subject to judicial review. Therefore, *amicus curie* respectfully requests that the Court grant leave to file this brief.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and they constitute 80% of all homes constructed in the United States.

As presented in the attached motion, the cost of land development can affect whether a homebuilder can develop a viable community. Furthermore, the presence of "waters of the United States" on a homebuilders' property affect the cost preparing the land. Thus, NAHB's members believe it is vital for them to be able to challenge the government's jurisdiction over their private property in a court of law without first incurring tens (or hundreds) of thousands of dollars in costs and experiencing substantial project delay in order to contest jurisdiction.

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1 Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than NAHB, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

In its Petition for Review, the government cites an Endangered Species Act case, *National Ass'n of Home Builders v. Norton,* 415 F.3d 8 (D.C. Cir. 2005), to support its argument that approved jurisdictional determinations are not reviewable under the Administrative Procedure Act. Amicus curiae summarizes a different NAHB case that is analogous to the matter before the Court and supports the argument that jurisdictional determinations are judicially reviewable. *National Ass'n of Home Builders v. United States Army Corps of Engineers,* 417 F.3d 1272 (D.C. Cir. 2005).

Additionally, NAHB provides an example of situation where the government conducted a jurisdictional determination on its own accord for the purpose of later asserting jurisdiction over thousands of square miles of land. Incredibly, even in that situation, the government argued that the determination was not a "final agency action" under the APA.

ARGUMENT

I. JURISDICTIONAL DETERMINATIONS IMPACT LAND DEVELOPERS' DAY-TO-DAY BUSINESS.

When the government provides a landowner with an "approved jurisdictional determination," it informs the landowner where "waters of the United States" are present and where they are not. *See* 33 C.F.R. §§ 328.3(a), 331.2 (defining "waters of the United States and "approved jurisdictional determination"). With respect to Clean Water Act ("CWA") section 404, 33 U.S.C. § 1344(a), that landowner may place dredged or fill material on those portions of her property that do not contain "waters of the United States" free from federal governmental interference. Often, land developers will avoid the "waters of the United States" completely and only work in the "upland" areas. They do so because the time and expense of obtaining a section 404 permit can drastically alter the expenses of a project.[2]

The government cites *National Ass'n of Home Builders v. Norton*, 415 F.3d 8 (D.C. Cir. 2005) to support its contention that approved jurisdictional determinations are not "final agency action" under the judicial review section of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704. Pet. for Writ

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2 "The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion).

of Cert. at 16. That case involved a challenge to a survey protocol – a guidance document intended to assist landowners in avoiding "take" of a rare butterfly. A more analogous case to the case before the court, however, is *National Ass'n of Home Builders v. United States Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005) (hereinafter *NAHB v. Corps*). In that case, the D.C. Circuit held that the APA allows judicial review of a Corps' CWA program that affects the manner in which private landowners may use their property.

In *NAHB v. Corps*, NAHB challenged a suite of Corps' issued general permits known as nationwide permits ("NWPs"). NWPs "authorize certain discharges of dredged and fill material into [waters of the United States] without any detailed, project-specific review by the Corps' engineers." *NAHB v. Corps*, 417 F.3d 1279-80. When a landowner who needs to discharge dredge or fill material cannot utilize one of the Corps' NWPs, she must obtain an individual permit before discharging pollutants into waters of the United States. *Id.* at 1275.

The District Court held that the NWPs were not final agency action. It reasoned that the NWP's were just "the first step of a larger permitting process that enables the agency to streamline the overall process " *National Ass'n of Home Builders v. United States Army Corps of Engineers*, 297 F.Supp.2d 74, 80 (D.D.C. 2003). The Court of Appeals disagreed. It explained that the impact of the NWPs on a builder's' "day-to-day business" was not hard to understand.

> While some builders can discharge immediately, others cannot. If [a builder's] planned activities do not meet the applicable NWP's conditions and thresholds, they have two options. They can either put their projects on hold and run the Corps' individual-permit gauntlet or modify the projects to meet the conditions. Either way, through increased delay or project modification, the NWPs directly affect investment and project development choices of those whose activities are subject to the CWA.

NAHB v. Corps, 417 F.3d at 1280.

The impacts of jurisdictional determinations on builders are very similar to the impacts of the NWPs. A builder who has obtained an approved jurisdictional determination providing that no "waters of the United States" are present on her property can place dredge or fill material on the property free from federal governmental interference.[3]

In contrast, if a Corps' jurisdictional determination provides that "waters of the United States" are present, and the landowner needs to place dredge or fill material in those areas, she can "either put [her] project on hold" and try to obtain a costly (and time consuming) CWA permit, or modify her project to

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3 There are, of course, other federal statutes that may affect land use (i.e. the Endangered Species Act), but they are not relevant to this example.

avoid the jurisdictional waters. Either way, jurisdictional determinations, like NWPs, "affect investment and project development choices" and are therefore "final agency actions." *Id.; See also Bennett v. Spear*, 520 U.S. 154, 169 (1997) (providing that while a biological opinion in theory serves an "'advisory function,' in reality it has a powerful coercive effect ").

NAHB v. Corps illustrates how Corps' decisions that occur before issuance (or denial) of a permit impact the manner in which landowners may use their property Therefore, NAHB respectfully request the Court grant certiorari and affirm the Eighth Circuit's holding that CWA jurisdictional determinations are reviewable under the APA.

II. JURISDICTIONAL DETERMINATIONS CAN PROVIDE THE GOVERNMENT WITH AUTHORITY TO CONTROL THOUSANDS OF ACRES OF PRIVATE PROPERTY.

In its Pet. for Writ of Cert., the government explains, "because jurisdictional determinations (unlike EPA compliance orders) are typically provided to persons who request them, they are not easily used "to enable the strong-arming of regulated parties." Pet. for Writ of Cert. at 19. While it is true that the government generally conducts jurisdictional determinations for those who request them, that is not always the case. When the government conducts a jurisdictional determination on its own, it is later able to assert control over large areas of land, which can affect thousands of private property owners. Yet, even in such situations, the government will

argue that it has not altered any rights or obligations, or that no legal consequences flow from such a determination. When this occurs, without any protections for the regulated public, the "strong arming" the Court was concerned with in *Sackett v. United States Environmental Protection Agency,* 566 U.S. ---, 132 S.Ct. 1367 (2012), is still in existence. The government's jurisdictional determination that two reaches of the Santa Cruz River in Arizona are "traditionally navigable waters" provides a perfect example of such a situation. [4]

In May 2008, Colonel Magness, U.S. Army Corps of Engineers, issued a determination that two reaches of the Santa Cruz River are "traditionally navigable waters" (hereinafter the "TNW Determination"). App. 10a. The government characterized this as a Clean Water Act jurisdictional determination.

The Santa Cruz River, from the 1800's to today is a discontinuous stream, normally flowing only in response to significant rainfall or discharges of effluent from regional wastewater treatment plants near Nogales and Tucson, in Southern Arizona. One of the two TNW reaches is only 22 miles long and the other is 32 miles long and begins at the discharge outlet of Pima County's Roger Road wastewater treatment plant in Tuscon, AZ. App. 10a-16a.

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4 The Corps TNW Determination became the subject of a Congressional investigation by the Committees on Oversight and Government Reform and on Transportation and Infrastructure. The Committees subpoenaed documents and, ultimately, issued a report on December 16, 2008. NAHB has provided some of the subpoenaed documents in its Appendix.

However, the Santa Cruz River watershed covers over 10% of Arizona, contains over 8,000 square miles, and includes the Tucson Metropolitan area – the second largest population center in Arizona.

The TNW Determination was "stand-alone," meaning it is not associated with a request from a property owner or permit application. *See* App. 4a; *see also* 33 C.F.R. §329.14. Instead, the Colonel made this determination because, in his words, "[w]e cannot determine jurisdiction [in the Santa Cruz River watershed] without first identifying the nearest downstream TNW" App. 6a. Recognizing the vital importance of TNWs to CWA jurisdiction following this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), Colonel Magness issued the stand-alone TNW Determination "to support some of the pending JDs" within the watershed. *Id.*

In June 2008, the Assistant Secretary of the Army for Civil Works suspended the TNW Determination pending a 60-day review by Corps' Headquarters. During the review period, Colonel Magness and his staff emphasized the importance of the Corps' TNW Determination for obtaining jurisdiction to regulate tributaries within the Santa Cruz River watershed. According to the Colonel, "without this TNW, the closest TNW may be the Colorado River, several hundred miles away. Using the [Colorado River] as a basis for JDs would likely mean that we would lose most of our jurisdiction in the state." App. 7a. Another Corps staff member explained that without the Corps' Stand Alone TNW Determination, the Corps would lose CWA jurisdiction over much of the Santa Cruz River watershed:

> If these reaches are not TNWs, there would be a profound effect on our ability to regulate tributaries to the Santa Cruz River. While the Santa Cruz would still likely be an RPW, the nearest TNW to the 8,600 square mile Santa Cruz River Watershed Basin would be 300 river miles away (the Colorado River) from the Pima County line. An inability to find a significant nexus for these tributaries would lead to a wide loss of jurisdiction and ultimately pose serious water quality concerns for the area.

App. 9a. Thus, the Corps made the TNW Determination because without it, the Corps would lose control over thousands of acres of private property.

Corps Headquarters never completed its 60-day internal review of the TNW Determination. Instead, in August 2008, EPA Headquarters declared the Santa Cruz River a "special case" under the U.S EPA, Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Section 404 Program and the Application of the Exemptions Under Section 404(F) of the Clean Water Act [hereinafter the MOU], *available at* http://water.epa.gov/lawsregs/guidance/wetlands/404f.cfm. A special case is "a circumstance where EPA makes the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404" of the CWA. *Id.* According to the MOU, "[c]ase-specific

determinations made pursuant to" it are "binding on the Government" – both EPA and the Corps – "and represent the Government's position in any subsequent Federal action or litigation regarding the case." *Id.*

The EPA concluded its review on December 3, 2008, affirming the Corps TNW Determination. App. 1a. In affirming the TNW Determination, the EPA described the regulatory and practical implications for landowners within the Santa Cruz River watershed:

> I have asked EPA Region 9 to begin immediately to implement this decision and request that you also transmit this determination to the Los Angeles District so it may be used by the Corps to complete pending and future jurisdictional determinations for the Santa Cruz River watershed.

App. 2a (emphasis added).

Thus, the government made an immediately binding determination that two reaches of the Santa Cruz River were "traditionally navigable waters." A decision it made i) so it could assert control over desert washes and other "tributaries" within 8,600 square-miles and ii) that would impact the rights of thousands of private land owners. Yet, neither those people who own land that contains tributaries of the Santa Cruz River, or those who own land bordering the Santa Cruz itself were notified of the determination.[5] In

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5 Pursuant to the Corps regulations, landowners have a right to an administrative appeal of approved jurisdictional

other words, all of this occurred "behind closed doors."

NAHB and its affiliates in Arizona disagreed with the analysis used to support the TNW Determination and with the process the government used to finalize it. With respect to the process, NAHB believed that a binding determination that affects millions of acres and thousands of private landowners must be accomplished in accordance with the notice and comment procedures set forth in the APA. 5 U.S.C. § 553. Therefore, NAHB filed its initial lawsuit challenging the EPA's and Corps' Santa Cruz TNW determination in 2009.

Without answering NAHB's Complaint, the government filed a motion to dismiss. Among its arguments, the government asserted the TNW Determination is not a "final agency action" under the APA. 5 U.S.C. § 704. Specifically, the government explained that the TNW Determination was not a "final agency action" until used in an enforcement action or incorporated into a permit decision.[6] Therefore, according to the government when it makes a "binding" decision asserting authority over millions of acres of land, affecting thousands of private citizens in a major metropolitan area, none of those citizens

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determinations. 33 C.F.R. § 331.1(a). The regulations also explain that the Corps will notify affected parties of their right to appeal. 33 C.F.R. § 331.4.

6 Under the line of cases overturned by *Sackett*, 566 U.S. ---, 132 S.Ct. 1367 (2012), the District Court ruled that the Clean Water Act precluded review of the TNW Determination. *National Ass'n of Home Builders v. U.S. E.P.A.*, 731 F. Supp. 2d 50, 56 (D.D.C. 2010), *aff'd on other grounds, sub nom. National Ass'n of Home Builders v. E.P.A.*, 667 F.3d 6 (D.C. Cir. 2011).

can seek judicial review of that decision until one of them applies for and completes the Corps' costly and time consuming permitting process. Furthermore, depending on the type of permit sought, the landowner may have to complete an administrative appeal before obtaining judicial review *See NAHB v. Corps*, 417 F.3d at 1275.

Amicus provides this example of a stand-alone jurisdiction determination to illustrate how the issue in the case before the Court may affect thousands of people without them evening knowing it. Amicus requests that the Court grant certiorari in this matter and explain to the government that when it asserts jurisdiction over private property, those landowners have a right to contest such assertion in court.

CONCLUSION

Whether a landowner may obtain judicial review of a CWA approved jurisdictional determination is of vital importance to the home building industry. Therefore, NAHB respectfully requests that the Court grant certiorari in this matter and affirm the decision of the Court of Appeals for the Eighth Circuit.

DATED: October 6, 2015

Respectfully submitted,

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APPENDIX

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON DC 20460

DEC 3 2008

OFFICE OF WATER

The Honorable John Paul Woodley, Jr.
Assistant Secretary of the Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington DC 20310

Dear Secretary Woodley:

In August 2008, I designated the Santa Cruz and Los Angeles Rivers as special case pursuant to the 1989 Army/EPA *Memorandum of Agreement Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the CWA*. EPA continues to evaluate relevant information and to coordinate with the Los Angeles District and others on this matter.

* * *

EPA's determination to affirm the District's designation of the two reaches as TNW's is based on several key considerations, including:

- Evidence that the physical characteristics with the Study Reaches indicate a susceptibility for use in the future for

commercial navigation, including commercial water-borne reaction. For example, river-width, when combined with flow data from relevant flow gauges, shows sufficient levels of flow in the Study Reaches to support navigation.

- Evidence that the Study Reaches, or portions thereof, have been navigated.
- Evidence of the likelihood of future commercial navigation use, including two ongoing Corps of Engineers river restoration feasibility studies.
- Visual inspection by EPA during site visits to Study Reaches.

* * *

I have asked EPA Region 9 to begin immediately to implement this decision and request that you also to transmit this determination to the Los Angeles District so it may be used by the Corps to complete pending and future jurisdictional determinations for the Santa Cruz River watershed.

In consultation with the Los Angeles District, EPA is proceeding with its geographic jurisdictional analysis of the remainder of the Santa Cruz and the Los Angeles River and will make decisions for both when our review is complete. I appreciate the Corps assistance in this important evaluation. Please feel free to call me or have your staff contact my Chief of Staff, Greg Peck, with any questions regarding this matter.

/s/ Grumbles
Benjamin H. Grumbles
Assistant Administrator

cc: Wayne Nastri, Regional Administrator, EPA Region 9

Stephen A. Owens, Director, ADEQ

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

SEP 24 2008

MEMORANDUM FOR DIRECTOR OF CIVIL WORKS

SUBJECT: Traditional Navigable Water Determinations Under the Clean Water Act

Effective immediately, the determination that a specific water body is a "traditional navigable water" (TNW) will be made by the Division Commander. Such TNW determinations will be based on a formal report of findings prepared by the District Engineer, accompanied by a legal opinion of the District counsel, and forwarded to the Division Commander for final decision. Every formal report of findings will be based substantially on applicable portions of the format described in paragraph (c) of 33 C.F.R. §329.14.

This directive applies to stand-alone TNW determinations for watercourses where the District Engineer proposes an upstream and downstream limit of navigability. This directive does not apply to TNW determinations associated with approved jurisdictional determination(s) or authorizations for the discharge of dredged or fill material into all waters of the United States, including wetlands. The purpose of this directive is to require additional technical review and oversight of TNW

determinations affecting watercourses and/or significant aquatic resources. This review will establish whether or not the TNW determination is supported by the Clean Water Act, the agency's implementing regulations, relevant case law, and existing guidance.

This directive shall remain in effect until rescinded in writing.

/s/ John Paul Woodley, Jr.
John Paul Woodley, Jr.
Assistant Secretary of the Army
(Civil Works)

------Original Message------

From: Magness, Thomas H COL SPL
Sent: Monday, June 30, 2008 4:53 PM
To: Stockton, Steven L HQ02
Cc: McMahon, John R BG SPD; Lang, Lawrence A HQ02; Benavides, Ada HQ02; Moyer, Jennifer A HQ02; Hannon, James R MVD
Subject: Re: Santa_Cruz_River_TNW_ Determination (UNCLASSIFIED)

Sir

Here are a few points on this:

-- We have a backing of nearly 400 JDs in the LA District. We are getting crushed under the weight of these post-Rapanos decisions. We cannot determine jurisdiction without first identifying the nearest downstream TNW This decision in Arizona was to determine the nearest TNW to support some of the pending JDs. We made these TNW calls on the Gila River and are now moving forward to look at associated JDs while similarly moving out on examinations of other rivers.

-- While Juridsiction [sic] is a complicated measure of chemical, biological, and physical impacts, the TNW determination is mostly a function of water quantity. In other words, does the water body have sufficient flow to support navigation? I am confident that we had the evidence and data to support this case.

-- On the Gila River, we identified two reaches with sufficient flow to support navigation. We deployed scientists to verify, looked at recent and historical flow data, and collected photographic evidence to verify these conditions.

-- In making this decision, we have stayed in contact with HQ Regulatory folks and with other districts making similar decisions, especially here in the West. The flow in these reaches is sufficient year-round to support our navigability decision. While it is mostly, but not exclusively. effluent from a wastewater treatment plant, we believe that case law does allow for this source in decisions of navigability

-- While not a factor in this decision, without this TNW, the closest TNW may be the Colorado River, several hundred miles away. Using the CR as a basis for JDs would likely mean that we would lose most of our jurisdiction in the state. I do not believe this was the intent of the Rapanos decision, even under the most conservative interpretations.

As you know sir, we are pinched on both ends on this. In California, we are taking heat from environmental groups who did not think we made enough of the LA River as a TNW In Arizona, we are hearing from developers who don't agree with what we have called TNWs.

Santa Cruz River TNW Data

------Original Message------
From: Smith, Chip R Mr ASA (CW) <email redacted>
To: Blaine, Marjorie E SPL
Cc: Troxel, Tiffany A SPL; Lester, Cynthia J SPL; Castanon, David J SPL; Young, Anne M Ms OGC <email redacted>; Moyer, Jennifer A HQ02; McLaughlin, Kimberly S HQ02
Sent: Fri Jun 13 08:30:01 2008
Subject: Re: ASA Inquiry on the Santa Cruz River TNW Determination

Good stuff. How long is the river and what is the length of the two sections. If these reaches are NOT TNWs what is the effect on the landscape in terms of jurisdiction over tribs and wetlands?

Chip

* * *

From: Cohen, Mark D SPL <email redacted>
Sent: Friday, June 13, 2008 5:55 PM
To: Smith, Chip R Mr ASA (CW)
Cc: Castanon, David J SPL; Blaine, Marjorie E SPL; Lester, Cynthia J SPL
Subject: Re: ASA Inquiry on the Santa Cruz River TNW Determination

Chip,

In response to your questions this morning:

The river is approximately 225 miles long. Reach A is 22 miles and reach B is 32 miles in length.

If these reaches are not TNWs, there would be a profound effect on our ability to regulate tributaries to the Santa Cruz River. While the Santa Cruz would still likely be an RPW, the nearest TNW to the 8,600 square mile Santa Cruz River Watershed Basin would be 300 river miles away (the Colorado River) from the Pima County line. An inability to find a significant nexus for these tributaries would lead to a wide loss of jurisdiction and ultimately pose serious water quality concerns for the area. Tributaries to the Santa Cruz include many perennial and intermittent streams, with wetlands and other high value resources (including Sabino Canyon, Davison Canyon, and Cienega Creek).

Let me know if you need anything else.

Thanks,

Mark

CESPL-RG-A 23 May 2008

MEMORANDUM FOR THE RECORD

SUBJECT: Determination of Two Reaches of the Santa Cruz River as Traditional Navigable Waters (TNW)

Summary

The Corps' Los Angeles District has determined that two reaches of the Santa Cruz River, Study Reach A from Tubac gage station (USGS # 09481740) to the Continental gage station (USGS #09482000) and Study Reach B from Roger Road wastewater treatment plant (WWTP) downstream to the Pima/Pinal County line, Arizona, as shown in Exhibit A, are TNWs (collectively, referred to as the "Study Reaches"). This determination is consistent with the Clean Water Act (CWA), the agencies' regulations (including 33 C.F.R.§ 328.3), relevant case law, and existing guidance, including the June 5, 2007 joint U.S. Environmental Protection Agency and Department of the Army legal memorandum entitled *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Rapanos Guidance) and *Appendix D* of the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* issued June 5, 2007 (Appendix D).

Background

The Santa Cruz River originates in Arizona, flows south into Mexico, and then flows north again into Arizona. It is the primary river which flows from Nogales, Mexico through Tucson, Arizona, and a number of Indian reservations, including Tohono O'odham Nation (TON), to the Gila River near Phoenix. The watershed of the Santa Cruz River is approximately 8,600 square miles. Until the late nineteenth century, the Santa Cruz River was primarily a perennial watercourse that served the region's agricultural needs until a quickly developing industrial society began to tap the river's subsurface flow (Exhibit B).

The Upper Santa Cruz River Valley, located between Nogales, Arizona on the US-Mexico border, and extending 65 miles north to the major urban area of Tucson, has a long history of European settlement spanning three centuries. Prior to the discovery of the area by European explorers, the area was inhabited for thousands of years by aboriginal native peoples. The Santa Cruz River has long been an important corridor for trade and exploration. The river and its well established riparian habitat have served as a vital commodity for people and wildlife in the region.[1]

In addition to the use of the Study Reaches by recreational watercraft described in case-specific

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1 *The Santa Cruz River: A Resource Shared by Two Cities* by Hugh Holub, paper presented to the Border XXI EPA Regional Water Sub Work Group Meeting on March 6, 2001, Nogales, Sonora.

analysis below, in the mid 1850s, William Rowlett and his brother, Alfred, constructed an earthen dam on the Santa Cruz River south of the present-day Silverlake Road. They also installed a water-powered flour mill at this location in 1857/58. In 1860, William Grant purchased the flour mill and the dam/lake and improved the dam and mill in order to supply military posts in the southwestern region. He built a second, larger mill on the river and purchased the machinery in California. However, the mill was burned in 1861 to keep it from falling into Confederate hands. The mill was purchased by James Lee and returned to operations in 1864. In 1884, the mill, dam, and lake were sold to Frederick Maish and Thomas Driscoll who developed the Silver Lake Resort. In 1883, Solomon Warner built a second dam and mill on the river. The lake was approximately 60 acres, 8 feet deep, and the Arizona Citizen reported the use of a flat-bottom boat on the lake. Waterfowl populated the lake and hunting organizations claimed exclusive rights to shooting the waterfowl. The dams at both Silver Lake and Warner's Lake were breached by floods in 1886 and 1887; the Arizona Star reported on July 13, 1887 that the river was wide and deep enough to float a "mammoth steamboat." In 1888, Frank and Warren Allison purchased Warner Lake, repaired the dam, and stocked the lake with carp for commercial fish production selling over 500 pounds of fish per day.

Both dams were washed out by 1890.[2]

Further, in the summer of 1951, Glenton G. Syke, Tucson city engineer, navigated the Santa Cruz River in a 14-foot-long boat from the San Xavier del Bac Mission to Congress Street in Tucson.[3]

The Study Reaches were selected based on personal knowledge of the river by Regulatory staff, evidence of perennial flows based on stream gage data, and more readily available evidence of navigability.

Basis for TNW Determination

The Rapanos Guidance indicates that in its context, the term TNW refers to those waters that are under the jurisdiction of the Corps, pursuant to 33 C.F.R. § 328.3(a)(1), (i.e., "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."

As stated in Appendix D: "when determining whether a water body qualifies as a "traditional navigable water" (i.e., an (a)(1) water), relevant considerations include whether a Corps District has

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2 History of Navigation of the Santa Cruz River by Don Bufkin, citation unknown.

3 Admiral of the Santa Cruz by Glenton G. Sykes, The Journal of Arizona History, Vol. 20, Number 4, Winter, 1979.

determined that the water body is a navigable water of the United States pursuant to 33 C.F.R. § 320.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 C.F.R. Part 329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is "navigable-in-fact" under the standards that have been used by the federal courts."

To determine whether the Study Reaches are a TNW, in accordance to 33 C.F.R. § 328.3(a)(1), a case-specific analysis to evaluate whether the Study Reaches are navigable-in-fact, including consideration of its potential susceptibility to interstate and foreign commerce, was undertaken. The Corps has determined that the Study Reaches are a TNW based on the following factors:

1. The physical characteristics of the Santa Cruz River within the Study Reaches indicate that they have the capacity and susceptibility to be navigated by recreational watercraft.

A. Study Reach A is approximately 22 miles in length. The river near Tubac is typically more confined in ordinary flows to a channel approximately 15-20 feet wide with an approximate 1.5 mile wide, densely vegetated floodplain. Downstream of Amado, the floodplain increases in width to approximately 2.5 miles; the river channel is less confined, less vegetated, and more braided. Exhibit C shows monthly and daily flows for the Tubac, Amado, and Continental gage stations, as well as peak flows for the Amado and Continental gage stations (Tubac information unavailable). The

monthly gage data indicate perennial flow at Tubac since 1996, flow most months at the Amado gage station since 2003 (prior years unavailable), and intermittent flows at the Contintental gage station.[4] Average daily flows are typically lower in May and June but increase during the summer monsoon season which typically begins in July. Average daily flow rates again typically increase during December and January. The gage data indicate the highest daily mean value at the Tubac gage station over the last 11-12 years was 637 cubic feet per second (cfs) during October and the lowest daily mean value at the same station during the same period was 4.5 cfs during June. The highest daily mean values typically occur from July-October.[5] The range of mean monthly flows (6.9 to 78 cfs) and the average daily flow in a representative year of 35 cfs indicate perennial flow at the Tubac gage station. The mean monthly discharge information at the Amado gage station is only available since October, 2003; the mean monthly discharge at this station in the last four years varied from .97 cfs to 67 cfs while the daily mean flow chart at the Amado gage station indicates perennial flow. The mean monthly discharge at the Continental gage station since 1940 varies from 43 cfs to 76 cfs while the mean daily values since 1939

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4 http://nwis.waterdata.usgs.gov/az/nwis/monthly

5 http://nwis.waterdata.usgs.gov/az/nwis/dvstat

shows flow daily with the exception of mid to late May through mid-June. This is expected since the river begins subsurface flow at this point, which defines the downstream end of this Study Reach.

B. Study Reach B is approximately 32 miles in length. The width of the riverbed varies from approximately 280 feet at the Roger Road WWTP to approximately 670 feet at Cortaro and approximately 575 feet at Trico Road while the active (ordinary flow) river channel at all three locations varies from 40-60 feet; at one location within this Study Reach, the river diverges into two similarly-sized channels. The river in Study Reach B is often confined at its maximum width by steep banks with soil cement or other bank stabilization in several locations. In other locations, for example at Ina Road, the river has lower, easily accessible, vegetated banks. Some areas are more densely vegetated than others. Exhibit C shows monthly, daily, and peak flows for gage stations at Cortaro and Trico Road (just upstream of the Pima/Pinal County line). Average daily flows are typically lower in May and June but increase during the summer monsoon season which typically begins in July. Average daily flows again typically increase during December and January. The highest average daily mean value at the Cortaro gage station over the last 57-60 years was 703 cfs, also in October, and the lowest average daily mean value at the same station over the same period was 22 cfs during June. The average monthly discharge ranges from 23 to 124 cfs and the average daily flow in a representative year of 75 cfs indicate perennial flow at the Cortaro gage station. At the Trico Road gage station, since 1997,

the average monthly discharge ranged from 3.5 cfs to 710 cfs and daily mean values since 1989 ranged from 11 cfs to 863 cfs. The gage data document perennial flow at the Cortaro and Trico Road gages every month since 1996 with the exception of October, 1996.[6]

C. The peak flow charts demonstrate the frequency of flows which exceed 1,000 cfs.[7] Peak flow data is unavailable at the Tubac gage station; however, the maximum peak flow at the Amado gage station since 2004 was approximately 7,800 cfs and peak flow has approached or exceeded 2,000 cfs annually. The maximum peak flow at the Continental gage station was approximately 45,000 cfs in the early 1980s and the minimum peak flow has exceeded 1,000 cfs 63 times since 1940. The maximum peak flow at the Cortaro gage station exceeded 60,000 cfs in the early 1980s and has exceeded 1,000 cfs on an annual basis from 1940-1988 with the exception of once in the 1940s and once in the 1950s; the peak flow at the Cortaro gage station has also exceeded 1,000 cfs on an annual basis since approximately 1995. The maximum peak flow at the Trico gage station exceeded 25,000 cfs in 2007 and the minimum peak flow has been at or exceeded 1,000 cfs most years since 1989. The figures at the end of Exhibit C indicate the "real time" stages for late March-early April, 2008, at the

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6 Ibid

7 http://nwis.waterdata.usgs.gov/az/nwis/peak

Tubac, Cortaro, and Trico Road gage stations indicating flows in the river on a daily basis.[8] All three stations indicated flows with depths varying from 1-2 feet and no precipitation had occurred for approximately 6 weeks.[9] Additional real-time stage data obtained for late May is also provided for Tubac, Green Valley (near Continental), Cortaro, and Trico Road and indicates 1-2 feet of water currently in the channel at all the above locations. Extremely light precipitation occurred one day during this timeframe; however, the amount of precipitation received would not have been sufficient to cause surface flows[10]. A list of the large magnitude peak flow events of the Santa Cruz River over the last 100 years is provided at Exhibit D.[11]

D. While there is a variation in minimum flow required for canoeing, studies indicate the 95% confidence interval on the predicted minimum canoeing flow of 86 cfs for flatwater is 63 to 118 cfs.[12] Approximately two-three feet of water depth is sufficient to float a canoe, kayak, or small boat.

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8 National Weather Service Advanced Hydrologic Prediction Service: http://www/nws.noaa.gov/oh/ahps/

9 Personal observation, Marjorie Blaine, Senior Project Manager, Regulatory Division, Tucson Project Office

10 Ibid

11 http://www.wrh.noaa.gov/twc/hydro/floodhis.php

Based on the above information, during most days from July-October and again for approximately half the months of December and January. there is sufficient flow in the Santa Cruz River within the Study Reaches to float a canoe (based on the average daily mean value). Typically a kayak would be able to navigate in lower flows and less water than canoes.

E. Based on aerial photographs attached at Exhibit E, the Santa Cruz River from Tubac gage station to just upstream of Continental gage station and Roger Road WWTP to the Pima/Pinal County line has uninterrupted flow.

F The Arizona Department of Environmental Quality has adopted water quality standards for the Santa Cruz River for partial body contact.[13] Partial body contact allows for use of the surface water where the body comes into contact with the water but does not become fully submerged. Allowable uses under partial body contact would include but are not limited to boating and wading.

2. The Study Reaches within the Santa Cruz River have public accessibility.

A. The river has low banks in the vicinity of Tubac which allows for easy public access; these

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12 Riparian Areas of the Southwestern United States: Hydrology, Ecology, and Management by Malchus B. Baker and Peter F. Ffolliott, CRC Press, 2004

13 Personal communication with Steve Pawlowski, Arizona Department of Environmental quality, Unit Manager, Water Quality Standards and Assessments, April 24, 2008.

areas are currently frequented by riders on horseback. Resorts along the river provide access for out-of-state visitors for birding and hiking along the river.

B. Two Corps of Engineers feasibility studies for river restoration, El Rio Medio and Tres Rios del Norte, are in process. El Rio Medio will begin at Congress Street and progress downstream to Prince Road; Tres Rios del Norte will begin at Prince Road and progress downstream to Sanders Road in Marana. These projects will provide public trails along the river. Although the final design for these two projects has not been completed, it is likely river access will be provided. The two projects are shown in Exhibit F

C. There is currently public access to the river at several bridges, including but not limited to the Ina Road bridge where there are pull-out areas, the Cortaro Road bridge (including a parking lot), and at the Sanders Road bridge in Marana. All of these bridges have easy access to Interstate 10.

D. The historic 1200-mile Juan Bautista de Anza National Historic Trail runs from Nogales, Arizona to San Francisco, California. This trail parallels and overlaps the Santa Cruz River in the Study Reaches. The river can be accessed at several points along this trail in the Study Reaches by auto or also on foot (Exhibit F).

3. The Study Reaches of the Santa Cruz River have been used for interstate commerce and have the potential to be used for commercial activities involving navigation and interstate commerce in the future.

A. Navigation has occurred historically and recent times within the Study Reaches of the Santa Cruz River.

(1) On August 23, 2005, as part of a promotion, a local radio show host navigated the Santa Cruz River in a raft for an unspecified distance starting at El Camino del Cerro (within Study Reach B) (Exhibit G).

(2) In October, 1994, two members of the Friends of the Santa Cruz navigated a 17-foot-long canoe from a point south of Tubac three miles to a point north of Tubac (Exhibit G).

B. The Santa Cruz River is an international and interstate water. Several areas along the river provide access for birding by out-of-state visitors and resorts bordering the river, such as the Tubac Golf Resort, host out-of-state visitors who partake in local recreation including hiking, horseback riding, and birding along the river. The Tucson Audubon Society's North Simpson Farm is an area where prolific riparian habitat restoration projects have been focused and it is well-known for its opportunities for birding. This type of "ecotourism" provides a significant water resource-oriented opportunity in the desert. The Study Reaches and other areas within the region receive many interstate and foreign tourists seeking to expand their "bird list"; the Sonoran Desert, particularly in riparian areas such as the Santa Cruz River, provides a significant opportunity to see species endemic to this area.

C. Use of the river within the Study Reaches by recreational watercraft provides evidence of the susceptibility for commercial use.

Determination

Public access points within of the Study Reaches such as low river banks, bridges, and trail systems, together with their physical characteristics, such as frequency, duration, and permanency of flow, indicate that the Study Reaches have the potential to be used for commercial recreational navigation activities, such as canoeing, kayaking, birding, nature and wildlife viewing. Such attractions and activities demonstrate that the Study Reaches may be susceptible to use in interstate commerce. Collectively, the above discussed factors demonstrate that the Study Reaches are navigable-in-fact, and thus a TNW, susceptible to use in interstate commerce associated with recreational navigation activities. Therefore, I hereby determine that the Study Reaches are subject to the jurisdiction of Section 404 of the CWA, pursuant to 33 C.F.R. § 328.3(a)(1).

This determination does not 1) consider any other potentially applicable bases for determining CWA jurisdiction within the Study Reaches or 2) foreclose analysis of other areas of the Santa Cruz River outside the Study Reaches for purposes of determining CWA jurisdiction.

05/23/08
Date

/s/ Thomas H. Magness
Thomas H. Magness
Colonel, US Army
District Commander